APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term 1968

CONLEY ELECTRONICS CORPORATION d/b/a TELEPROMPTER OF LIBERAL, INC.,

Petitioner,

v. No. 9503

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

SOUTHWEST KANSAS TELEVISION CO., INC. KANSAS STATE NETWORK, INC., and KAKE-TV AND RADIO, INC.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

[April 22, 1968]

* * * * *

Before MURRAH, Chief Judge, HILL, Circuit Judge and CHRISTENSEN, District Judge.

MURRAH, Chief Judge

Petitioner, Conley Electronics Corporation, the owner and operator of a community antenna television (CATV) system in Liberal, Kansas, seeks review under §402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a), of a memorandum opinion and order of the Federal Communications Commission denying Conley's petition for a waiver of the nonduplication requirements of the Commission's rules, 47 C.F.R. §74.1103(f). The waiver request was denied by the Commission without a hearing. Conley (1) challenges the validity of the nonduplication rule, asserting that it is outside the jurisdiction of the Commission and violative of the First Amendment; and (2) contends that the failure to provide a hearing is violative of various procedural statutes and deprives him of due process of law.

A brief review of the development and regulation of CATV may prove beneficial to an understanding of the questions involved. A CATV system is a facility which, by means of high antennae, picks up the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes of subscribing members of the community served by the system. First Report and Order, 38 F.C.C. 683, 684, (1965). Subscribers pay an initial installation charge and a monthly fee for this service. Some systems use microwave relay stations to relay signals to the CATV antennae. During the early years of its development, CATV was used almost exclusively to bring television signals to areas where the mountainous terrain made reception difficult or the sparse population made the operation of a local station economically unfeasible. In subsequent years, however, CATV systems expanded the scope of their service and began distributing programs originating from distant

stations into areas which already had local television stations. The result was a unanimous cry for regulation by the local broadcasters, who feared that an enlargement of the number of stations available in a community would splinter the market, thereby causing a decrease in audience size and a reduction in the advertising revenues of the local stations. See Note, The Wire Mire: The FCC and CATV, 79 Harv. L.R. 366 (1965); Note, CATV and Copyright Liability, 80 Harv. L.R. 1514 (1967).

Following an initial disclaimer of jurisdiction, 26 F.C.C. 403, 427-28 (1959), the Commission, after a general rule-making proceeding which attracted numerous and voluminous comments from interested parties, asserted jurisdiction over CATV systems using microwave facilities to transmit their signals, and adopted certain rules involving their operation. First Report and Order, *supra*. At the same time, a Notice of Inquiry and Notice of Proposed Rule Making, 1 F.C.C. 2d 453 (1965), was released looking toward regulation of those systems not using microwave relay facilities. Again, formal and informal comments were accepted by the Commission. Subsequently, in March 1966, the Commission asserted jurisdiction over all CATV systems and adopted applicable rules. Second Report and Order, 2 F.C.C. 2d 725 (1966). These rules provide, *inter alia*, that CATV systems (1) must, upon request, carry the signals of local stations; and (2) cannot, on the same day, carry a signal which duplicates a program of a local station. 47 C.F.R. §74.1103(a)(f). These rules are commonly refered to, respectively, as the "carriage" and "nonduplication" rules. We are concerned only with the nonduplication rule.

The Commission's decision to adopt the rules rested on its determination that failure to carry the signals of the local stations and duplication of their programs on the same day constituted "unfair competitive practices" on the part of the CATV systems. The Commission was

concerned lest CATV operations ultimately drive out television broadcasting service, thus depriving the public as a whole of free service, service to outlying areas,[1] and local service with local control and selection of programs. First Report and Order at p. 700. The Commission concluded, therefore, that in view of its statutory obligation under the Communications Act to make television service available, so far as possible, to all people of the United States on a "fair, efficient and equitable" basis, 47 U.S.C. §307(b), adoption of CATV rules was necessary in the public interest.

In addition to the carriage and nonduplication rules, the Commission adopted Rule 74.1109, 47 C.F.R. §74.1109, which provides that "upon petition by a CATV system, * * * the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems * * * ." The rule requires, however, that the waiver petition "state *fully and precisely all pertinent facts and considerations* relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest."

Conley's CATV system has been in operation in Liberal, Kansas since 1956. It carries the signals of six television stations into the homes of 2,100 subscribers. Three of these stations are admittedly so-called "local" stations, located within 60 miles of Liberal. The other three are distant stations, located approximately 140 miles away in Amarillo, Texas. The signals from the Amarillo stations are relayed by microwave facilities to a point where they are received by Conley and retransmitted to the subscribers.

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[1] Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. First Report and Order at p. 699.

In June 1966, two months after the effective date of the Commission's CATV rules, Conley filed a petition for a waiver of the nonduplication rule. Under that rule, petitioner would be required to delete those programs from the Amarillo stations which duplicate the programs broadcast by the local Kansas stations if released on the same day. Conley based its waiver request upon the grounds, *inter alia*, that operation of its CATV system had no discernible adverse economic effect on the three local Kansas television stations; that, on the other hand, compliance with the rule might have an adverse financial impact on the petitioner's CATV system and might lead to a disruption of service; that, moreover, the Commission had no authority to adjudicate by rule matters of "unfair competition"; and that, in any event, the rule should not be applied without first affording Conley a hearing.

In denying the waiver request, the Commission held that the reasons for applying the nonduplication rule without a specific showing of adverse economic impact on the local station had been carefully explained in the Second Report and Order; and that Conley had supplied no factual support for its allegation of disastrous financial impact or disruption of service. The Commission also rejected Conley's challenge of authority to issue the rule, and held that Conley's threshold factual allegations showed no necessity for a hearing.

When the Commission subsequently denied Conley's petition for reconsideration, this petition for review was filed, and we granted Conley's motion for a stay.

Due to the manner in which Conley has intermixed and proliferated his various contentions, it is difficult to discern exactly what errors are asserted. We will, however, consider and dispose of those questions which we are able to glean from the petitioner's arguments.

Conley's initial contention seems to be that the nonduplication rule is invalid because: (1) it rests upon a finding by the Commission that CATV duplication constitutes "unfair competition", a determination that the Commission has neither the authority nor the jurisdiction to make; and (2) it constitutes an improper restraint on free speech in violation of the First Amendment. In support of his first assertion, Conley argues that the rule is in conflict with *F.C.C. v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940), where the Supreme Court emphasized that "the [Communications] Act recognizes that the field of broadcasting is one of free competition." *Id* at 474.

We cannot agree with Conley's postulate. Indeed, we think the rule is not only consistent with Sanders, but affirmatively implements it. In Sanders the Court held that since it is not the purpose of the Act to protect a licensee against competition, economic injury to an existing station, standing alone, is not a ground for denying the licensee application of a new station. But the Court was quick to add that the question of competition becomes vitally important, and should not be disregarded by the Commission, when economic injury to an existing station may result in a diminution or reduction of broadcast service to the public. See *Carroll Broadcasting Co. v. F.C.C.*, 258 F.2d 440 (1958). As we have seen, it was precisely this prospect of an overall reduction of television service, hence injury to the public, which prompted the Commission to adopt its CATV rules. We hold that the nonduplication rule was a reasonable exercise of the Commission's authority. See *Wheeling Antenna Co., Inc. v. F.C.C.*, ___ F.2d ___ (4 CA, Feb. 28, 1968).

As to Conley's claim that the nonduplication rule treads upon its First Amendment right to freely distribute available television signals, the short answer is that

the argument comes too late. This contention was not presented before the Commission and, as Chief Justice Vinson emphasized in *Unemployment Compensation Commission of Alaska v. Aragon,* 329 U. S. 143, "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Id* at 155. See also *WLIL, Inc. v. F.C.C.,* 352 F.2d 722 (1965); *Florida Gulfcoast Broadcasters, Inc. v. F.C.C.,* 352 F.2d 726 (1965); *Presque Isle TV Co., Inc. v. F.C.C.,* ___ F.2d ___ (CA 1, Dec. 18, 1967). Moreover, the argument is without merit. Several courts have rejected similar contentions in upholding a denial by the Commission of a license to a microwave carrier seeking to serve a CATV system. See *Carter Mountain Transmission Corp. v. F.C.C.,* 321 F.2d 359 (1963); *Idaho Microwave, Inc. v. F.C.C.,* 352 F.2d 729 (1965). See also *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943). Conley seeks to distinguish those cases on the ground that they were concerned with licensing rather than the direct regulation of CATV systems. We think, however, that the cases are indistinguishable. In both situations what is involved is reasonable regulation in the public interest. Cf. *Buckeye Cablevision, Inc. v. F.C.C.,* 387 F.2d 220 (1967).

This brings us to what appears to be the best of Conley's case – that the Commission's failure to provide for an evidentiary hearing before ordering the petitioner to comply with the nonduplication rule violated the requirements of the Communications Act and the Administrative Procedure Act, and deprived him of due process of law.

Preliminarily, Conley seems to suggest that he is entitled to a hearing under the following provisions of the Communications Act: §309(e), which provides for a hearing upon any application for a license where there exists

a substantial and material question of fact; §303(m)(2), which requires a petitioner prior to the suspension of an operator's license; §312(c), which provides for a hearing prior to revocation of a license; and §316, which bars any modification of a license without a hearing. The short answer is that Conley, by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms.

Avoidance of this conclusion is sought by the apparent suggestion that the Commission, through its CATV rules, is, in fact, exercising "complete licensing authority" over petitioner's business, and should, therefore, prior to modifying that business, afford Conley all the procedural rights normally afforded licensees. The foible in this argument is that even if Conley were a licensee of the Commission, it would have no automatic right to a hearing under any of the cited provisions of the Communications Act.

In *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956), the FCC amended certain of its rules to provide, in effect, that a license for a television broadcast station would not be issued to any party having an interest in five such stations. On the same day Storer's pending application for an additional station was summarily dismissed because he already had five stations. Storer sought review of the Commission's order, contending that the rules, as amended, were in conflict with the mandates of §309 of the Communications Act that applicants must have a full hearing before denial of an application for a license. The Supreme Court held that although §309 did require a "full hearing", this did not withdraw from the Commission the rule making authority necessary for the orderly conduct of its business. In that respect, the Court declared:

> "We read the Act and Regulations as providing a 'full hearing' for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to [the Commission's waiver rule], that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, requires no more. We agree with the contention of the Commission that a full hearing, such as required by §309(b) * * * would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open." *Id.* at 205.

Storer was followed in *Federal Power Commission v. Texaco,* 377 U. S. 33 (1964). There the FPC adopted a rule prohibiting certain pricing provisions in the rate schedules of independent producers of natural gas, and subsequently rejected, without hearing, applications for certificates of public convenience and necessity which contained rate schedules with the prohibited provisions. We held that the Commission's rule could not be applied to deprive a certificate applicant of the adjudicatory hearing guaranteed him by §7 of the Natural Gas Act. *Texaco, Inc. v. F.P.C.,* 317 F.2d 796 (1963). The Supreme Court taught us, however, that "the statutory requirement for a hearing under §7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold

those who neither measure up to them nor show reasons why in the public interest the rule should be waived." 377 U.S. 33, 39.

It is thus clear that when rules of general application are promulgated in a valid rule-making proceeding, as was done here, they may be generally applied by the Commission without individual adjudicatory hearings unless a party, claiming to be agrieved, sets forth reasons why the public interest would be served by an individualized waiver of the rule. See *California Citizens Band Assn. v. United States,* 375 F.2d 43 (1967); *American Airlines, Inc. v. Civil Aeronautics Board,* 359 F.2d 624 (1966); *Interstate Broadcasting Co. v. F.C.C.,* 323 F.2d 797 (1963). Conley claims its petition comes within the teachings of Storer and Texaco, and also within the requirements of Rule 74.1109, and sets forth facts entitling it to a waiver or at least a hearing. Suffice it to say that after carefully examining Conley's petition, we agree with the Commission that neither was justified. Some of the reasons listed by Conley were questions already considered and rejected by the Commission at the rule-making proceeding leading to the adoption of the CATV rules. The remaining allegations failed to factually demonstrate that the public interest would be served by exempting Conley from the sweep of the nonduplication rule. In short, we do not think Conley stated a claim upon which relief could be granted.

Nor is the Administrative Procedure Act helpful. It imposes no requirement of an adversary hearing before an agency, but only specifies the procedure to be followed when a hearing is required by some other statute. 5 U.S.C. §554. See also *Webster Groves Trust Co. v. Saxon,* 370 F.2d 381 (1966).

The net result of all this is said to deprive Conley of the full use of its property, and that to do this without a hearing violates due process of law. This due process

issue was not specifically raised or treated in either Storer or Texaco, but we think it is fully answered by the Second Circuit in *Air Lines Pilots Assn., International v. Quesada,* 276 F.2d 892 (1960). There the Administrator of the Federal Aviation Agency promulgated a rule barring individuals over 60 years of age from serving as aircraft pilots. The pilots complained that the regulation deprived them of property in their pilots' licenses without due process. Chief Judge Lumbard rejected this contention:

> "Nor does the regulation violate due process because it modifies pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See *United States v. Storer Broadcasting Co., supra; Bowles v. Willingham,* 1944, 321 U. S. 503, 519-520 * * * . Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected – here some 18,000 – might demand to be heard individually. * * * All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest." *Id.* at 896.

See also *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U. S. 441 (1915).

Nothing said here or in the case law forecloses a hearing on a petition which sets forth "reasons, sufficient if true, to justify a change or waiver of the Rules" in the public interest. We simply hold that no such reasons were shown by Conley's petition.

Finally, Conley seems to contend that, in any event, it was entitled to a hearing under §312 of the Communications Act, which authorizes the Commission to enter a cease and desist order only after a hearing to a party who: "(1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter * * * , or (3) has violated or failed to observe any rule of regulation of the Commission * * * ." Conley says that the Commission's order directing it to comply with the nonduplication rule "within thirty (30) days" is tantamount to a cease and desist order under §312. The short answer is that Conley did not fail to observe the provisions of a license or a statute. Nor did he violate the nonduplication rule, since the filing of his waiver petition automatically stayed the applicability of the rule. See 47 C.F.R. §74.1109(h). Conley was not a party to whom a cease and desist order could issue. Rather than a cease and desist order, we think the Commission's order was merely a directive giving Conley notice of a date certain when it would be expected to be in compliance with the nonduplication rule.

Affirmed.

APPENDIX B

FCC 67-208

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re	)
TelePrompTer of Liberal, Inc., Liberal, Kans.	)
Request for Waiver of Sections 21.712 and 74.1103 of the Commission's Rules	)

MEMORANDUM OPINION AND ORDER

(Adopted February 15, 1967)

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioners Loevinger and Johnson concurring in the result; Commissioner Wadsworth absent.

1. On June 17, 1966, TelePrompTer of Liberal, Inc., owner and operator of a CATV system in Liberal, Kans., and TelePrompTer Transmission of Kansas, Inc., a communications common carrier which provides service to the Liberal CATV system, filed a joint petition to set aside, stay, annual, suspend, and/or waive CATV nonduplication rules, in which it requested waiver of the program exclusivity requirements of sections 21.712(g) and 74.1103(e) of the Commission's rules; the petition was opposed by Kansas State Network, Inc., licensee of television broadcast station KGLD, Garden City, Kans., and by KAKE TV and Radio, Inc., licensee of station

KUPK-TV, Garden City, Kans. A reply to the oppositions was filed by the joint petitioners.

2. TelePrompTer of Liberal operates a 6-channel, microwave-fed CATV system which supplies approximately 2,200 subscribers with the following television signals: KTVC (CBS), Ensign, Kans.; KGLD (NBC) and KUPK-TV (ABC), Garden City, Kans.; KFDA-TV (CBS), KGNC-TV (NBC), and KXII (ABC), Amarillo, Tex. Liberal is within the predicted grade B contours of the Kansas stations and two of them – KGLD and KUPK-TV – seek program exclusivity on the Liberal CATV system, while TelePrompTer of Liberal and its common carrier ask a waiver of this requirement.

3. Petitioners advance the following arguments in support of the waiver request: *(a)* That operation of the Liberal CATV system has no discernible adverse economic effect on the three Kansas television stations; *(b)* that furnishing program exclusivity may have an adverse financial impact on the CATV system; *(c)* that furnishing program exclusivity may lead to disruption of service; *(d)* that in view of the copyright decision in *United Artists Television, Inc. v. Fortnightly Corporation,* 255 F. Supp. 177, appeal pending before the U. S. Court of Appeals for the Second Circuit (docket No. 30767), a broadcaster should not be entitled to assert its right to program exclusivity without first agreeing to indemnity a CATV operator for its potential copyright liability; *(e)* that a broadcaster should be required to pay the CATV operator's cost resulting from implementation of program exclusivity; *(f)* that the program exclusivity requirement should not be applied without first allowing the CATV operator a hearing; and *(g)* that since it has been held that a CATV system's operation does not constitute unfair competition, citing *Cable Vision, Inc. v. KUTV, Inc.,* 335 F.2d 348, cert. den. 379 U. S. 989, this is an improper basis for the Commission's assertion of jurisdiction.

4. The petitioners' contentions are ruled upon, as follows: *(a)* The Commission explained, in the *Second Report and Order,* its reasons for requiring program exclusivity without requiring a showing of adverse economic impact; *(b)* petitioners have supplied no factual support for the allegation of disastrous financial impact; *(c)* when the Commission adopted the *Second Report and Order,* it determined that same-day program exclusivity would not have an unduly disruptive effect on CATV service, and petitioners fail to point to any special circumstances which would warrant a departure from this view; *(d)* no copyright liability question can arise where only deletion of a program on a CATV system is at issue; *(e)* TelePrompTer of Liberal has elected to carry distant signals and, under our rules and their underlying rationale, it, therefore, has the burden of effecting the required same-day program exclusivity, absent a showing of unusual or extraordinary circumstances warranting some other appropriate course, which showing has not been made here; *(f)* section 74.1109(f) of the rules makes provision for hearings; however, petitioners' threshold factual allegations do not persuade us that a hearing is necessary here; and *(g)* the *KUTV* case did not consider and purport to deal with the unfair competition aspect developed in the *Second Report and Order* under the public-interest standard of the Communications Act of 1934, as amended. That case held only that parties in a private suit must proceed under copyright law, rather than on the concept of unfair competition or interference with contractual rights, in view of such decisions as *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U. S. 225, and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U. S. 234.

5. In view of the foregoing, the Commission finds that a grant of the requested waivers of sections 21.712 (g) and 74.1103(e) of the Commission's rules would not be consistent with the public interest.

Accordingly, *It is ordered,* This 15th day of February 1967, that the joint petition to set aside, stay, annul, suspend, and/or waive CATV nonduplication rules, filed jointly by TelePrompTer of Liberal, Inc. and TelePrompTer Transmission of Kansas, Inc., on June 17, 1966, *Is Denied.*

It is further ordered, That TelePrompTer of Liberal, Inc., *Is directed* to comply with the requirements of section 74.1103(e) of the Commission's rules on its CATV system at Liberal, Kans., within 30 days of the release date of this memorandum opinion and order.

Federal Communications Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner Robert T. Bartley

Assuming, arguendo, the validity of the CATV rules, I would here grant full relief as requested by the CATV.

APPENDIX C

FCC 67-652

[Caption omitted]

MEMORANDUM OPINION AND ORDER

(Adopted June 7, 1967)

By the Commission: Chairman Hyde absent; Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger dissenting.

1. On February 24, 1967, the Commission released its opinion and order in *TelePrompTer of Liberal, Inc.*, FCC 67-208, 7 FCC 2d 120, in which it denied requests for waiver of the program exclusivity requirements of sections 21.712(g) and 74.1103(e) of the Commission's rules, filed jointly by TelePrompTer of Liberal, Inc., owner and operator of a CATV system in Liberal, Kans., and TelePrompTer Transmission of Kansas, Inc., a communications common carrier, and directed that TelePrompTer of Liberal, Inc., comply within 30 days. On March 23, 1967, TelePrompTer of Liberal, Inc., filed a petition for reconsideration of the cited opinion and order,[1] which is opposed by KAKE-TV and Radio, Inc., licensee of station KUPK-TV, Garden City, Kans.; Southwest Kansas Television Co., Inc., licensee of television broadcast station KTVC, Ensign, Kans.; and Kansas State Network, Inc., licensee of television broadcast station KGLD, Garden City, Kans.

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[1] A motion for temporary stay, filed by TelePrompTer of Liberal, Inc., on Mar. 24, 1967, was denied Apr. 26, 1967. *TelePrompTer of Liberal, Inc.*, FCC 67-506, ___ FCC 2d ___.

2. TelePrompTer advances a plethora of allegations[2] of which the following appear to be most pertinent: *(a)* That the stations receiving program exclusivity are satellities (sic) of more distant stations; *(b)* that implementation of of program exclusivity will, in effect, drprive it of three channels of service and adversely affect its ability to continue profitable operation; *(c)* that in 1965 it all-banded its CATV system at considerable cost; *(d)* that the Commission has employed a "template" approach in ruling on its waiver request; *(e)* that there is a greater community of interest between Liberal and Amarillo than between Liberal and the communities to which the stations here involved are licensed; *(f)* that the Commission recognizes that it does not license CATV systems, yet, at the same time, denies CATV operators procedural protections which would be available to a broadcast licensee before modification of its license; *(g)* that such action without hearing violates "due process" concepts; *(h)* that a hearing before the Commission in these circumstances culminated in a decision that nonduplication was not required nor warranted; and *(i)* that a hearing is required before the Commission's opinion and order can become effective.

3. We have lettered petitioner's allegations in the preceding paragraph so that they can be ruled upon seriatim; *(a)* petitioner did not advance this argument in its initial waiver request and does not justify its failure to do so — consequently, the argument is barred by section 1.106 of the rules. Further, the rationale of the *Second Report and Order* would, on the present facts, require protection of satellites; *(b)* we must again reject this argument on the ground that it has no factual support. Nor is the impact of new broadcast service on a CATV system equitable with the requirement that a duplicated program

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2. The findings of fact to which these allegations relate are contained in FCC 67-208.

be deleted; *(c)* at the time it all-banded its CATV system, the proceedings in dockets Nos. 15069-15072, looking toward imposition of nonduplication conditions, were in process. TelePrompTer was thus on actual notice of the possibility that it might be required to furnish program exclusivity, and is, therefore, barred from asserting this as an equity; *(d)* apparently petitioner objects to the fact that very similar waiver requests, phrased in very similar language, have been rejected by the Commission on very similar grounds, which have also been phrased in very similar language. But it is clearly desirable that different parties making the same argument receive the same treatment; in any event, the critical consideration is that we have examined the argument made and have ruled upon it; *(e)* this argument has not been supported. But even if it had been, it must be rejected as irrelevant to the considerations for requiring program exclusivity articulated in the *Second Report and Order; (f), (g), (i)* the short answer to these arguments is that we have provided for hearings where they appear justified – but petitioner's arguments have not persuaded us that a hearing is required in its case; and *(h)* no citation is furnished for this proposition. Nor did our action in *TelePrompTer Transmission of Kansas, Inc.,* 2 FCC 2d 312, modifying Examiner Schildhause's decision at 38 FCC 489, and the Review Board's decision at 38 FCC 477 have such effect.

In view of the foregoing, the Commission finds that its earlier action (FCC 67-208, 7 FCC 2d 120) was consistent with the public interest.

Accordingly, *It is ordered,* That the petition for reconsideration, filed March 23, 1967, by TelePrompTer of Liberal, Inc., directed against the Commission's cited action (FCC 67-208, 7 FCC 2d 120) *Is denied.*

Federal Communications Commission,
Ben F. Waple, *Secretary.*

Dissenting Statement of Commissioner Robert T. Bartley

In my opinion, the CATV rules are invalid and waivers are not necessary. However, assuming their validity, I would here grant full relief as requested by the CATV.

APPENDIX D

EXTRACT OF RECONSIDERATION OF SECOND REPORT AND ORDER

Docket 14895, *et al.*

MEMORANDUM OPINION AND ORDER

(Adopted January 5, 1967)

[Reprinted Here is Part I Only, Dealing With the First Amendment Questions Presented]

* * * * *

I

2. The contentions concerning the Commission's jurisdiction are essentially repetitive of arguments fully considered in our previous opinions.[2] We shall treat in greater detail the question of whether the rules are inconsistent with constitutional and statutory requirements of

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[2] The contentions concerning the validity of the "grandfathering" date of Feb. 15, 1966, our decision to make the rules effective upon publication in the Federal Register, our failure to hold a full evidentiary hearing before promulgating the rules, and the general adequacy of notice of rulemaking have all been discussed in the memorandum opinion and order, released May 27, 1966, denying petitions for stay of the effective date of the rules, FCC 66-456, 3 F.C.C. 2d 816. It is contended further that sufficient notice was not given that "final" rules, rather than "interim" action pending a resolution of pt. II of the rulemaking, would be adopted for CATV operations in major markets. While the *Second Report* dealt only with pt. I and pars. 49 and 50, we examined the comments on pt. II and concluded that they added very little to the comments on pars. 49 and 50, certainly nothing which

(Continued)

free speech. See, e.g., *Back Mountain Telecable, Inc.*, 5 F.C.C. 2d 735. Such inconsistency is urged on the ground that they interfere with the right to receive programs and direct the conduct of CATVs in deciding what programs shall and shall not be carried. Assuming that the provisions of section 326 of the Communications Act, 47 U.S.C. 326, are applicable to CATVs, we see no violation of either the first amendment or that statutory provision.

3. It is well established that reasonable regulation of radio transmissions, if consistent with the public interest as that term is defined taking into account the overall purposes and provisions of the act, is not violative of the right of free speech. *National Broadcasting Co. v. United States,* 319 U. S. 190 (1943); *Lafayette Radio Electronics Corp. v. United States,* 345 F.2d 278 (C.A. 2, 1965). This principle has been applied to the imposition of carriage and nonduplication restrictions on CATVs similar to those finally adopted in the *Second Report and Order. Carter Mountain Transmission Corp. v. Federal Communications Commission,* 116 U. S. App. D. C. 93, 321 F.2d 359 (1963), cert. deh. 375 U. S. 951; *Idaho Microwave, Inc. v. Federal Communications Commission,* 122 U. S. App. D. C. 253, 352 F.2d 729 (1965).

4. While it is true that those cases dealt with radio licensing, we have now held that CATVs provide an extension of a broadcast service; see also *Clarksburg Publishing Co. v. Federal Communications Commission,* 96 U. S. App. D. C. 211, 217, 225 F.2d 511, 517 (1955).

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[2] (Continued)

would permit us to adopt substantive rules resolving the policy issues in this area. We decided that evidentiary hearings were necessary and our major market procedure operates pending a resolution of the issues by this process rather than by the rulemaking process.

If, as we believe, Congress has given us the regulatory authority we have asserted, there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.[3] The public-interest considerations remain the same, as does the impact upon speech. We are not concerned here with the sort of "sweeping suppression of home subscription television" which was stricken down on free speech grounds in *Weaver v. Jordan,* 49 Cal. Reptr. 537, 411 P.2d 289 (1966), but rather with limited regulation.

5. So far as our rules go beyond the original carriage and nonduplication requirements to prohibit extending certain signals beyond their grade B contour without a hearing, it can hardly be contended, in light of the existing authorities, that the right of free speech includes the right of a party subject to the act's jurisdiction (here an interstate communicator by wire) to extend the service area of a television station beyond the area authorized by the Commission, in a manner inconsistent with the public interest. Thus, the CATV system has no more constitutional right to extend the service area of a station in a manner inconsistent with the public interest than the station would have the constitutional right to increase its height and power in violation of our rules or the public interest. *National Broadcasting Co. v. United States,* 319 U. S. 190 (1943); see sections 303(h) and 307(b) of the act.

6. One other contention on the question of the Commission's authority warrants brief discussion.[4] It is urged

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[3] See also *United Artists Television, Inc. v. Fortnightly Corp.,* 255 F. Supp. 177 (S.D.N.Y., decided May 23, 1966), explaining in detail why CATVs are not merely reception facilities and that they do transmit radio waves, albeit by wire.

[4] We think no more than mention need be made of the contention that the rules deprive parties holding local franchies of property

(Continued)

that the Commission cannot rely upon any of the radio licensing provisions of title III of the act, on the theory that they do not apply to wire transmissions but only authorize regulation of radio and television stations licensed under title III. This approach parallels the argument made, and rejected, in *Carter Mountain, supra,* that the Commission was applying "broadcast regulation" to common carriers.

7. The Communications Act does not so compartmentalize the Commission's functions. On the contrary, it created one agency "for the purpose of regulating interstate and foreign commerce in communication by wire and radio" by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communications * * * " (sec. 1, 47 U.S.C. 151). When a new development constitutes an extension of radio or television service, as CATV does, it is unrealistic to treat it as though it were totally unrelated.

8. Congress " * * * did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the

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[4] (Continued)

without compensation. Federal regulation of businesses engaged in interstate commerce is not subject to attack on that ground. *Nelson Brothers Bond & Mortgage Co. v. Federal Radio Commission,* 289 U. S. 266, 282. The contention that systems in operation prior to the issuance of the notice of proposed rulemaking have a constitutional right to be "grandfathered" is also patently without merit. Rules adopted after full rulemaking procedures may validly be applied to existing systems. We have, however, repeatedly indicated our intention to avoid undue disruption to the public in this connection.

Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved." *National Broadcasting Co. v. United States,* 319 U. S. 190, 219-220. We cannot adopt a view of the act which would frustrate both the congressional intent and the more effective use of radio in the public interest.

* * * * *

APPENDIX E

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ADMINISTRATIVE PROCEDURE ACT
5 U.S.C.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make

the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not –

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply –

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

COMMUNICATIONS ACT OF 1934
47 U.S.C. §§

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each

application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

ADMINISTRATIVE SANCTIONS

Sec. 312. (a) The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than

thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

APPLICATION OF ANTITRUST LAWS; REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

Sec. 313. (a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the

provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

PRESERVATION OF COMPETITION IN COMMERCE

Sec. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person

directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case, the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

MODIFICATION BY COMMISSION OF CONSTRUCTION PERMITS OR LICENSES

Sec. 316. (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action

and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided,* That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

CENSORSHIP; INDECENT LANGUAGE

Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

F.C.C. RULES AND REGULATIONS
47 C.F.R. §§

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

* * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals

of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadccast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

* * *

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.